SUBJECT INDEX

	Page
Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement	3
Reasons for Granting the Writ	6
Conclusion	16

INDEX TO APPENDICES

Appendix A. Order	App. p. 1
Appendix B. Order Denying Convocation of Three-Judge Court	2
Appendix C. Complaint for Declaratory Relief and Injunction [Title 28 U.S.C. §1331]	3

TABLE OF AUTHORITIES CITED

Cases	Page
Conley v. Gibson, 355 U.S.41	7
Doe v. Bolton, 410 U.S.179	10, 11, 12
Epperson v. Arkansas, 393 U.S.97	11
Flast v. Cohen, 392 U.S.83	6, 9, 12
Goosby v. Osser, 409 U.S.512	13
Hamling, et al. v. United States, No. 73-507	13
Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S.713	13
Jackson v. Choate, 404 F.2d 910 (5 Cir. 1968)	15
Jenkins v. McKeithen, 395 U.S.411	6
Miller v. California, 413 U.S.15	2
NAACP v. Button, 371 U.S.415	8
Perez v. Ledesma, 401 U.S.82	12
Poe v. Ullman, 367 U.S.497	11
Reed Enterprises v. Corcoran, 354 F.2d 519 (D.C. Cir. 1965)	14
Roe v. Wade, 410 U.S.113	12
Svejkovsky v. Tamm, 326 F.2d 657 (D.C. Cir. 1963)	15
United States v. Students Challenging Regulatory Agencies Procedures (SCRAP), 412 U.S.669	9
Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S.172	6

Rules	
Federal Rules of Civil Procedure, Rule 8(f)	7

Statutes	Page
United States Code, Title 18, Sec. 1461	2, 3, 4, 12
United States Code, Title 18, Sec. 1462	2, 3, 4, 12
United States Code, Title 18, Sec. 1465	2, 3, 4, 12
United States Code, Title 28, Sec. 1254(1)	2
United States Code, Title 28, Sec. 2282	1, 2, 3, 5, 6, 9, 13, 15, 16
United States Code, Title 28, Sec. 2284	1, 2, 3, 5, 6, 9, 13, 15, 16
United States Constitution, Art. III	2, 6, 14
United States Constitution, First Amendment	14

IN THE

Supreme Court of the United States

October Term, 1973
No. .....

ADULT FILM ASSOCIATION OF AMERICA, a Texas corporation; ENTERTAINMENT VENTURES, INC., a California corporation; DAVID FRIEDMAN and VINCENT MIRANDA, on Behalf of Themselves and All Other Persons Similarly Situated,

Petitioners,

vs.

THE HONORABLE MALCOLM M. LUCAS, District Judge of the United States District Court for the Central District of California,

Respondent,

WILLIAM B. SAXBE, individually and as Attorney General of the United States; and WILLIAM D. KELLER, individually and as United States Attorney for the Central District of California,

Real Parties in Interest.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on January 14, 1974, denying a Petition for Writ of Mandamus to compel the respondent court to convene a Three-Judge Court in accordance with the provisions of Title 28 United States Code §§ 2282 and 2284.

Opinions Below.

The United States Court of Appeals for the Ninth Circuit denied the Petition for a Writ of Mandamus by an unreported Order, a copy of which appears as Appendix A. The District Court denied petitioner's application for the convocation of a Three-Judge Court by an unreported Order, a copy of which appears as Appendix B.

Jurisdiction.

The order and judgment of the Court of Appeals for the Ninth Circuit was entered on January 14, 1974. This Court's jurisdiction is invoked under Title 28 United States Code § 1254(1).

Questions Presented.

1. Whether petitioners' Complaint alleged an actual case or controversy and satisfied the requirements imposed by Article III of the Constitution.

2. Whether petitioners' Complaint raised a substantial question as to the unconstitutionality of the provisions of Title 18 United States Code §§ 1461, 1462 and 1465, prior to June 21, 1973, on the ground of vagueness, in light of *Miller v. California*, 413 U.S.15, and the related cases.

3. Whether the court below erred in denying petitioners' Petition for a Writ of Mandamus to compel the respondent District Court to take the necessary steps for the convening of a Three-Judge Court to enjoin enforcement of Title 18 United States Code §§ 1461, 1462 and 1465 for conduct engaged in prior to June 21, 1973, in accordance with the provisions of Title 28 United States Code §§ 2282 and 2284.

Statement.

1. On October 10, 1973, petitioners filed in the United States District Court for the Central District of California a Complaint for Injunctive and Declaratory Relief, naming as the defendants the Attorney General of the United States, and the United States Attorney for the Central District of California (hereinfter referred to as the "District Attorney"). The Complaint (a copy of which appears as Appendix C) alleged that the federal criminal obscenity statutes [18 U.S.C. §§ 1461, 1462 and 1465] were, prior to June 21, 1973, unconstitutionally vague. Petitioners prayed for an injunction restraining the Attorney General and the District Attorney from initiating or continuing with criminal prosecutions under §§ 1461, 1462 or 1465 for conduct engaged in prior to June 21, 1973.[1] In accordance with the provisions of Title 28 United States Code §§ 2282 and 2284, petitioners prayed for the convening of a Three-Judge Court to hear and determine the case.

2. The Complaint alleged that petitioner Adult Film Association of America, Inc. (hereinafter referred to as "AFAA") is a corporation consisting of producers, distributors and exhibitors of motion picture films, many of which depict scenes dealing with sex and contain nudity; that petitioners Friedman and Miranda are members of AFAA; that some of the members of

[1]With regard to conduct engaged in subsequent to June 21, 1973, the Complaint prayed for an injunction restraining the said Attorney General and the District Attorney from initiating any criminal prosecution under §§ 1461, 1462 or 1465, without first bringing a civil proceeding to determine whether a challenged work is legally obscene. Petitioners also sought parallel declaratory relief. The focus of this Petition, however, is upon the application of the federal criminal obscenity statutes to conduct engaged in prior to June 21, 1973.

AFAA have been indicted under one or more of the federal criminal obscenity statutes [18 U.S.C. §§ 1461, 1462 and 1465] for acts engaged in prior to June 21, 1973; that other AFAA members have been threatened by the Attorney General and the District Attorney with prosecution under the said federal obscenity statutes, for producing, distributing or exhibiting motion picture films which the Attorney General and District Attorney allege are obscene; that the Attorney General and District Attorney have threatened to continue with pending prosecutions for conduct engaged in prior to June 21, 1973, unless restrained; that the constitutional validity of the federal criminal obscenity statutes, prior to June 21, 1973, cannot be determined in a single prosecution since the Attorney General and the District Attorney have instituted multiple prosecutions against petitioners throughout the Nation under the said statutes for conduct engaged in prior to June 21, 1973.

3. The Complaint alleged that §§ 1461, 1462 and 1465 were unconstitutionally vague prior to June 21, 1973, because:

(a) the provisions of said statutes concededly do not contain a description of the specific sexual conduct *Miller* held to be constitutionally necessary, and prior to June 21, 1973 the provisions of the said statutes had not received an authoritative construction reading the necessary terminology into the said statutes;

(b) prior to June 21, 1973, the provisions of the said statutes were authoritatively construed

as requiring proof that allegedly obscene works offend national standards, which nationwide standards this Court found were unascertainable, unprovable and nonexistent;

(c) prior to June 21, 1973, the provisions of the said statutes had been authoritatively construed as requiring proof that allegedly obscene works were "utterly without redeeming social value", a test this Court found was "unworkable" and "ambiguous".

4. On November 12, 1973, the respondent court heard petitioners' application for the convening of a Three-Judge Court, and on November 19, 1973 entered an Order denying said application (Appendix B). On December 19, 1973, petitioners filed a Petition for Writ of Mandamus in the United States Court of Appeals for the Ninth Circuit, praying for the issuance of a writ of mandamus directing the respondent court to take the necessary steps for the convening of a Three-Judge Court in accordance with the provisions of Title 28 United States Code §§ 2282 and 2284. On January 14, 1973, the Ninth Circuit entered its Order denying said Petition (Appendix B).

REASONS FOR GRANTING THE WRIT.

1. In its Order denying the convocation of a Three-Judge Court, the respondent court stated that petitioners' "complaint raises an insubstantial question because of the lack of a specific factual setting." It thus appears that the respondent court acknowledged, albeit silently, the substantiality of the constitutional attack on the federal criminal obscenity statutes as they existed prior to June 21, 1973, but was of the opinion that petitioners failed to present an actual case or controversy. Petitioners deal with the question of the substantiality of their attack on the obscenity statutes in their next Point, and turn immediately to the issue of whether their Complaint satisfied the requirement imposed by Article III of the Constitution that those who seek to invoke the power of federal courts must allege an actual case or controversy. *Flast v. Cohen,* 392 U.S.83, 94-101; *Jenkins v. McKeithen,* 395 U.S.411, 421-425.

For all practical purposes, the posture of the case is the same as if respondent court had granted a motion to dismiss.[2] Accordingly, the material allegations of the Complaint are taken as admitted. See, *e.g., Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.,* 382 U.S.172, 174-175. And the Complaint

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[2]The only effective relief for the petitioners requires the convening of a Three-Judge Court. Petitioners' Complaint is still on file before the respondent court and all further proceedings will be heard only by a single judge. Because of the provisions of 28 U.S.C. §§ 2282 and 2284, a single judge has no authority to adjudicate the challenged federal criminal obscenity statutes on constitutional grounds and to enjoin the enforcement of the said statutes on the ground of unconstitutionality. In short, petitioners have been relegated to a tribunal which might have authority to decide against petitioners but would have no authority to decide in favor of the petitioners. Obviously, a hearing before a tribunal which can only make an adverse decision is no hearing at all.

is to be liberally construed in favor of petitioners. See, Fed. Rule Civ. Proc., 8(f); *Conley v. Gibson*, 355 U.S.41. Unless it appears that petitioners could prove no set of facts in support of their claim which would entitle them to the convening of a Three-Judge Court, such a court should be convened. With these principles in mind, petitioners now turn to the allegations of their Complaint.

A. Petitioner AFAA is a membership corporation consisting of producers, distributors and exhibitors of motion picture films. Many of the said films contain nudity and scenes dealing with sex. Petitioners Friedman and Miranda are members of AFAA. Some members of AFAA have been indicted under one or more of the federal criminal obscenity statutes as the same existed prior to June 21, 1973. Subsequent to June 21, 1973, petitioner Miranda and other members of AFAA have been called before federal grand juries in connection with alleged violations of said statutes, and still other AFAA members have been threatened with prosecution under the said statutes for producing, distributing or exhibiting motion picture films which the Attorney General or the District Attorney allege are obscene (Appendix C, Paragraphs III, IV and XXIV).

The Attorney General and the District Attorney are responsible for initiating criminal prosecutions under the federal criminal obscenity statutes against members of AFAA for conduct which occurred prior to June 21, 1973, and are also responsible for threatening other and different prosecutions against one or more members of AFAA for conduct engaged in subsequent to said date (Appendix C, Paragraphs VI and VII).

Unless enjoined, the Attorney General and the District Attorney will continue to prosecute members of

AFAA for conduct engaged in prior to June 21, 1973. Petitioners' constitutional challenge to the federal obscenity statutes as they were construed prior to June 21, 1973 cannot be finally determined in a single prosecution, since the Attorney General and the District Attorney have instituted multiple prosecutions throughout the Nation for conduct engaged in prior to June 21, 1973. Moreover, the Attorney General and the District Attorney were charged with enforcing the said statutes for conduct engaged in prior to June 21, 1973 without any expectation of securing valid convictions, the true intent of said prosecutions being to harass members of AFAA and exhaust their financial and physical resources to such an extent as to put them out of business; to harass and interfere with their right to produce, distribute and exhibit constitutionally protected motion picture films; to deny to the public at large access to constitutionally protected motion picture films dealing with sex; to establish a national censorship of all motion picture films dealing with sex; and to impose prior restraints upon the circulation of the press and abridge freedoms of speech and press secured to all persons, including members of AFAA, by the provisions of the First Amendment to the United States Constitution (Appendix C, Paragraphs XIII, XIV and XV).

B. It is settled that an organization whose members are injured has standing to assert the rights of its members. In *NAACP v. Button,* 371 U.S.415, 428, the Court stated: "We . . . think petitioner has standing to assert the . . . rights of its members. See, *NAACP v. Alabama ex rel. Patterson,* 357 U.S.449, 458, 460 . . .; *Bates v. City of Little Rock,* 361 U.S.516, 527, n. 9 . . .; *Louisiana ex rel. Gremillion v. NAACP,* 366 U.S.293, 296. . . ."

In *United States v. Students Challenging Regulatory Agencies Procedures (SCRAP)*, 412 U.S.669, an organization sought to enjoin enforcement of an Interstate Commerce Commission rate increase, asserting that its primary purpose was to enhance the quality of the human environment for its members and all citizens. To establish standing, SCRAP claimed that its members "suffered economic, recreational and aesthetic harm directly as a result of the adverse environmental impact of the railroad freight structure, as modified by the Commission's actions. . . ." (412 U.S. at 678).

The Government challenged SCRAP's standing to sue, arguing that the allegations in the pleadings as to standing were vague, insubstantial and insufficient. A three-judge court was convened pursuant to 28 U.S.C. §§ 2282 and 2284 and found that SCRAP had the requisite standing. This Court said that "we agree" with this finding (412 U.S. at 685).

> ". . . [W]e have . . . made it clear that standing is not to be denied simply because many people suffer the same injury. . . . To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion." (412 U.S. at 687-688).

Petitioners Friedman and Miranda, members of AFAA, also have standing to advance the constitutional claims asserted herein. Standing, of course, is "an aspect of justiciability". *Flast v. Cohen*, 392 U.S.83, 98. The "fundamental aspect" of standing is that:

> ". . . it focuses on the party seeking to get his complaint before a federal court and not on the

> issues he wishes to have adjudicated. . . . [W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." (*Id.*, at 99-100).

In *Doe v. Bolton*, 410 U.S.179, this Court clarified the formula for determining standing and justiciability. In that case, 24 individual and two corporate plaintiffs sought declaratory and injunctive relief against enforcement of the Georgia abortion statutes. The district court held that all the plaintiffs had standing but that only Doe, a pregnant married woman, presented a justiciable controversy. In particular, the lower court held that a group of state-licensed physicians who were consulted by pregnant women, while theoretically possessed of standing, did not present a justiciable controversy (319 F.Supp.1048, 1052-1054 [N.D. Ga. 1970]). The Supreme Court modified the judgment as to the physicians and held that they had standing and also presented a justiciable controversy:

> "Inasmuch as Doe and her class are recognized, the question whether the other appellants—physicians, nurses, clergymen, social workers, and corporations—present a justiciable controversy and have standing is perhaps a matter of no great consequence. We conclude, however, that the physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, *or threatened with prosecution*, for violation of the

> State's abortion statutes. The physician is *the one against whom these criminal statutes directly operate in the event he procures an abortion* that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. *They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief. Crossen v. Breckenridge,* 446 F.2d 833, 839-840 (6th Cir. 1971); *Poe v. Menghini,* 339 F. Supp. 986, 990-991 (D.Kan. 1972)." (410 U.S. at 188) (Emphasis added).

While the lower court in *Doe v. Bolton* relied primarily on *Poe v. Ullman,* 367 U.S.497, in holding that the physicians did not present a justiciable controversy, this Court declined to apply that decision to the justiciability issue, noting that the Georgia abortion statute was "not moribund" (410 U.S. at 188). The Court instead invoked the holding of *Epperson v. Arkansas,* 393 U.S. 97, in which it recognized the right of a school teacher, not yet criminally charged, to seek a declaratory judgment that her State's anti-evolution statute was unconstitutional even though it had never been enforced in nearly 40 years. Under the standard adopted by the Court in *Doe v. Bolton,* the fact that the physicians were "the one[s] against whom these criminal statutes directly operate" was held to be sufficient to establish both standing and justiciability. The physicians had not been prosecuted, nor were they threatened with prosecution, under the challenged statutes. In the case at bar, as in *Bolton,* justiciability and standing exists because the criminal statutes directly operate against the petitioners seeking relief herein.

It should not be forgotten that petitioners have alleged that unconstitutional criminal statutes are being employed to deter constitutionally protected conduct. *Cf., Perez v. Ledesma,* 401 U.S.82, 101-102 (opinion of Brennan, J.).

Petitioners' Complaint establishes, plainly, that they have the requisite personal stake in the outcome of the controversy that insures that the dispute to be adjudicated will be presented in an adversary context and in a form viewed as capable of judicial resolution. *Doe v. Bolton,* 410 U.S.179; *Roe v. Wade,* 410 U.S.113, *Flast v. Cohen,* 392 U.S.83.

2. As noted above, the respondent court apparently acknowledged that the attack on the constitutionality of 18 U.S.C. §§ 1461, 1462 and 1465 as they existed prior to June 21, 1973 was substantial. As heretofore stated, petitioners alleged in their Complaint that the provisions of 18 U.S.C. §§ 1461, 1462 and 1465, on their face and as construed and applied prior to June 21, 1973, were unconstitutionally vague because:

> (a) the provisions of said statutes concededly do not contain a description of the specific sexual conduct *Miller* held to be constitutionally necessary, and prior to June 21, 1973 the provisions of the said statutes had not received an authoritative construction reading the necessary terminology into the said statutes;
>
> (b) prior to June 21, 1973, the provisions of the said statutes were authoritatively construed as requiring proof that allegedly obscene works offend national standards, which nationwide standards this Court found were unascertainable, unprovable and nonexistent;

(c) prior to June 21, 1973, the provisions of the said statutes had been authoritatively construed as requiring proof that allegedly obscene works were "utterly without redeeming social value", a test this Court found was "unworkable" and "ambiguous" (Appendix C, Paragraphs XI and XXI).

The grant of certiorari in *Hamling, et al. v. United States,* No. 73-507, establishes the substantiality of the constitutional question raised. Under *Goosby v. Osser,* 409 U.S.512, petitioners have, indisputably, raised a substantial question entitling them to a Three-Judge Court pursuant to the provisions of 28 U.S.C. §§ 2282 and 2284.

3. "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." *Idlewild Bon Voyage Liquor Corp. v. Epstein,* 370 U.S. 713, 715.

The constitutional question raised by petitioners is substantial. Petitioners' Complaint formally alleges a basis for equitable relief and comes within the requirements of the three-judge-court statute. Accordingly, it was the plain duty of the respondent court to convene a court in accordance with the provisions of 28 U.S.C. §§ 2282 and 2284, as prayed for by petitioners. Upon the respondent court's failure to convene such a court, it became the plain duty of the court below to order the respondent court do do so as requested by petitioners in their Petitioner for Writ of Mandamus.

In *Reed Enterprises v. Corcoran*, 354 F.2d 519 (D.C. Cir. 1965), mandamus issued for the convening of a three-judge court, following the denial of a motion for such a court by a single judge. In that case, the federal obscenity statute was attacked on the ground that the forum-shopping aspects of the statute rendered it unconstitutional. After holding that a substantial constitutional question was raised, the court addressed itself to whether there was a case or controversy and whether injunctive relief was appropriate. In holding that there was a case or controversy within the intendment of Article III and that a three-judge court was required to hear the case, the court observed that the complaint alleged threats to initiate criminal prosecution under the obscenity law and that First Amendment rights were at stake. "Where the plaintiff complains of chills and threats in the protected First Amendment area, a court is more disposed to find that he is presenting a real and not an abstract controversy." (354 F.2d at 523). In *Reed*, the allegations concerning the appropriateness of equitable relief were similar to the allegations in the Complaint herein. In holding that injunctive relief was appropriate, assuming the truth of the allegations of the Complaint, the court said:

> ". . . Petitioners allege that the multiplicity of legal proceedings which the Government intends to bring will destroy their businesses, exhaust their financial resources, and make it impossible to defend themselves. . . .
>
> "The Government's suggestion that petitioners have an adequate remedy at law in the criminal proceedings now pending against them, while perhaps appropriate in cases outside the First Amend-

> ment area where a single prosecution is contemplated, is unavailing here. The Government has not even denied that it contemplates multiple prosecutions. . . . Moreover, under some circumstances even a single 'criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. * * * The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases.' Dombrowski v. Pfister, *supra*, 380 U.S. at 486, 85 S.Ct. at 1120. Compare Terrace v. Thompson, 263 U.S. 197, 216, 44 S.Ct. 15, 68 L.Ed. 255 (1923)." (354 F.2d at 523).

In *Svejkovsky v. Tamm*, 326 F.2d 657 (D.C. Cir. 1963), the court issued a writ of mandamus requiring the convening of a three-judge court following a ruling by a single judge refusing to certify the case pursuant to 28 U.S.C. §§ 2282 and 2284. The court there stated:

> ". . . The single judge . . . failed to take the necessary steps to have a three-judge court convened. Instead, on the motion of the Secretary of State, he stayed further proceedings pending the outcome of a pending Supreme Court case raising the same or similar issues. . . . If such a stay is deemed proper here, under §2284 it should, in any event, be granted by the court of three judges, and not by the single judge who is required to initiate the three-judge proceedings." (326 F.2d at 657-658).

See also, *Jackson v. Choate*, 404 F.2d 910 (5 Cir. 1968).

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit. That court should be ordered to direct the respondent court to take the necessary steps for the convening of a three-judge court in accordance with the provisions of Title 28 United States Code §§ 2282 and 2284.

Respectfully submitted,

STANLEY FLEISHMAN,
Attorney for Petitioners.

SAM ROSENWEIN,
FLEISHMAN, MCDANIEL, BROWN &
WESTON,
Of Counsel.

APPENDIX A.

Order.

United States Court of Appeals for the Ninth Circuit.

Adult Film Association of America, a Texas corporation; Entertainment Ventures, Inc., a California corporation; David Friedman and Vincent Miranda, on behalf of themselves and all other persons similarly situated, Petitioners, vs. United States District Court, Central District, Respondent, Elliott Richardson, individually and as Attorney General of the U.S. et al., Real Parties in Interest. No. 73-3589.

Filed: Jan. 14, 1974.

Before: MERRILL and DUNIWAY, Circuit Judges.

The writ of mandamus sought by petition filed herein on December 18, 1973, is denied.

/s/ Charles M. Merrill
/s/ Ben C. Duniway
U. S. Circuit Judges

APPENDIX B.

Order Denying Convocation of Three-Judge Court.

United States District Court, Central District of California.

Adult Film Association of America, etc., et al., Plaintiffs, vs. Elliott Richardson, etc. et al., Defendants. Civil No. 73-2378-MML.

The Order to Show Cause dated October 10, 1973, came on regularly for hearing before the court on November 12, 1973; it appearing to the court that the plaintiffs' complaint raises an insubstantial constitutional question because of the lack of a specific factual setting,

IT IS ORDERED that the plaintiffs' prayer for a convocation of a three-judge court is denied.

DATED: This 19th day of November, 1973.

/s/ Malcolm M. Lucas
UNITED STATES DISTRICT JUDGE

APPENDIX C.

Complaint for Declaratory Relief and Injunction [Title 28 U.S.C. §1331].

United States District Court, Central District of California.

Adult Film Association of America, a Texas corporation; Entertainment Ventures, Inc., a California corporation; David Friedman and Vincent Miranda, On Behalf of Themselves and All Other Persons Similarly Situated, Plaintiffs, vs. Elliott Richardson, individually and as Attorney General of the United States; and William D. Keller, individually and as United States Attorney for the Central District of California, Defendants. Civil No. 73-2378 MML.

Filed: Oct. 10, 1973.

PLAINTIFFS ALLEGE AS FOLLOWS:

JURISDICTION

I

The jurisdiction of this Court over this action is invoked under Title 28 United States Code §1331, the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $10,000.00, and arises under the Constitution and laws of the United States, and particularly under:

(a) the First Amendment to the Constitution of the United States:

(b) the Fifth Amendment to the Constitution of the United States;

(c) the Sixth Amendment to the Constitution of the United States;

(d) the Eighth Amendment to the Constitution of the United States;

(e) Article I, Section 8, Clause 3 of the Constitution of the United States;

(f) Title 18 United States Code §1461;

(g) Title 18 United States Code §1462; and

(h) Title 18 United States Code §1465.

II

The jurisdiction of this Court is further invoked under Title 28 United States Code §§2201 and 2202. Plaintiffs also invoke the jurisdiction of this Court pursuant to Title 28 United States Code §§2282 and 2284, requiring convening of a three-judge court, this being an action to restrain enforcement of the federal obscenity laws on the ground that the same are violative of rights secured by the Constitution of the United States.

PARTIES

III

The ADULT FILM ASSOCIATION OF AMERICA (hereinafter referred to as "AFAA") is a membership corporation, incorporated in the State of Texas, consisting of producers, distributors and exhibitors of motion picture films. Many of the said films contain nudity and scenes dealing with sex. Said films are exhibited only in motion picture theaters which limit attendance to consenting adults. Plaintiffs DAVID FRIEDMAN (hereinafter referred to as "Friedman") and VINCENT MIRANDA (hereinafter referred to as "Miranda") are members of AFAA.

Plaintiff ENTERTAINMENT VENTURES, INC. (hereinafter referred to as "EVI") is a corporation

duly organized and doing business in the State of California. Said plaintiff produces motion picture films and distributes said films throughout the United States, using the United States mails, common carriers and private transportation. Among the films produced and distributed by said plaintiff are films containing nudity and scenes dealing with sex. The said films are exhibited only in motion picture theaters which limit attendance to consenting adults.

IV

Some of the members of AFAA have been indicted under one or more of the federal obscenity laws [Title 18 United States Code §§1461, 1462 and 1465], as the same existed prior to June 21, 1973. Subsequent to June 21, 1973, other members of AFAA have been called before federal grand juries in connection with alleged violations of the said federal obscenity statutes, and still other AFAA members have been threatened with prosecution under the said federal obscenity statutes for producing, distributing or exhibiting motion picture films which defendants herein allege are obscene.

V

Plaintiffs herein bring this action on their own behalf and on behalf of all other persons similarly situated. The issues stated in this action and the questions herein to be litigated are of common and general interest to all other persons similarly situated to the named plaintiffs herein and affect all other persons in exactly the same manner as plaintiffs herein are affected. The parties plaintiffs hereto are so numerous that it is impracticable to bring all such parties before the Court as individual plaintiffs. The class of plaintiffs is certain and ascertainable.

VI

Defendant ELLIOTT RICHARDSON (hereinafter referred to as "Richardson") is Attorney General of the United States and the Head of the Department of Justice. He is sued individually and in his official capacity. Under and by virtue of the provisions of Title 5 United States Code §291, said defendant has the authority to supervise and conduct all suits brought by or against the United States, including the authority to begin criminal prosecutions. Said defendant is invested with general superintendence of all such suits, and all of the United States attorneys who bring such suits, or institute such criminal prosecutions, in the various United States District Courts throughout the Nation, are placed under said defendant's immediate direction and control. Defendant Richardson is responsible for initiating prosecutions under one or more of the federal obscenity statutes against one or more of the plaintiffs herein for conduct which occurred prior to June 21, 1973, and he is also responsible for threatening to initiate other and different obscenity prosecutions against one or more of the plaintiffs herein for conduct engaged in subsequent to June 21, 1973.

VII

Defendant WILLIAM D. KELLER (hereinafter referred to as "Keller") is the United States Attorney for the Central District of California, and is sued individually and in his official capacity. Said defendant has the authority to supervise and conduct all suits brought by or against the United States, including the authority to begin criminal prosecutions in the United States District Court for the Central District of California. Said defendant is invested with general superintendence of

all such suits in the Central District of California. Defendant Keller is responsible for initiating prosecutions under one or more of the federal obscenity statutes against one or more of the plaintiffs herein in the Central District of California for conduct which occurred prior to June 21, 1973, and he is also responsible for threatening to initiate other and different obscenity prosecutions against one or more of the plaintiffs herein in the Central District of California for conduct engaged in subsequent to June 21, 1973.

STATUTES

VIII

Title 18 United States Code §1461 provides in relevant part, as follows:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> * * *
>
> "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained; . . .
>
> * * *
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according

to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter. * * * "

IX

Title 18 United States Code §1462 provides in relevant part, as follows:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

* * *

"Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

X

Title 18 United States Code §1465 provides as follows:

"Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

"When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest."

XI

A. On June 21, 1973, the United States Supreme Court held that the reach of all statutes purporting to suppress alleged obscenity must be strictly limited to works which depict or describe particular forms of sexual conduct, which conduct must be specifically defined by the applicable statute, as written or authoritatively construed. Prior to June 21, 1973, none of the three statutes in question [Title 18, U.S.C. §§1461, 1462 nor 1465] were limited, on their face, to reach only depictions or descriptions of specifically defined sexual conduct. Prior to June 21, 1973, no competent court had ever rendered an authoritative construction of any of the said statutes to limit their ambit to specifically defined sexual conduct.

B. On June 21, 1973, the United States Supreme Court held that no person will be subject to prosecution for the sale or exposure of obscene materials unless such materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating law, as written or authoritatively construed. The Court further held that unless laws regulating obscenity are so limited to reach only specifically defined sexual conduct, such laws do not provide fair notice to the public of what conduct is within the ambit of these laws.

C. On June 21, 1973, the United States Supreme Court refused to adopt as a constitutional standard the utterly without redeeming social value test, and rejected as a constitutional standard the ambiguous concept of social importance. Prior to June 21, 1973, the federal obscenity statutes here involved had been judicially construed to require the government, in prose-

cutions pursuant to such statutes, to affirmatively establish that the material challenged as obscene was utterly without redeeming social value or importance.

XII

In cases initiated by defendants under said statutes for conduct engaged in prior to June 21, 1973, the defendants herein have urged federal courts to apply retroactively the new and prospective standards enunciated by the Supreme Court on June 21, 1973. Said retroactive application of the new and radically different standards would violate constitutional guarantees.

A. In the case of *United States v. Lang, et al.*, United States District Court for the Central District of California, No. 10712-HP-CD (July 18, 1973) (appeal pending, Court of Appeals for the Ninth Circuit, undocketed), the Court held that such a retroactive application of the new standards would be comparable to *ex post facto* legislation specifically condemned as being contrary to the due process provisions of the Federal Constitution.

B. In *Bouie v. City of Columbia*, 378 U.S.347, 84 S.Ct.1697, the Supreme Court specifically held that vague statutes cannot be cured in a given case by a construction in that very case attempting to place valid limits on the statutes.

C. Any attempt to read the new standards into an indictment brought prior to June 21, 1973, would be tantamount to amending the indictment returned by the grand jury, contrary to constitutional commands.

XIII

One or more of the members of AFAA and one or more other members of the class herein presently stand indicted under Title 18 United States Code §§1461, 1462 or 1465, for conduct engaged in prior to June 21, 1973, and under indictments returned prior to said date. Unless restrained by the Court herein, defendants will continue to prosecute said plaintiffs for said conduct engaged in prior to June 21, 1973. Plaintiffs cannot obtain adequate vindication for their constitutional rights in any single prosecution instituted by defendants against plaintiffs under the said federal obscenity statutes. The constitutional validity of the said statutes as of June 21, 1973, cannot be finally determined in a single prosecution, since defendants have instituted multiple prosecutions throughout the Nation for conduct engaged in prior to June 21, 1973. Such conduct by defendants will necessarily involve plaintiffs in a multiplicity of legal proceedings; involve and threaten plaintiffs with the destruction of their good will and property; and exhaust their financial and physical resources, and thus make it impossible for plaintiffs to adequately defend against the said multiple criminal prosecutions. Such conduct will cause plaintiffs to suffer great, immediate and irreparable loss and damage, for which they have no adequate remedy at law.

XIV

Defendants' threats to enforce the aforementioned statutes, as herein stated, are not made with any expectation of securing valid convictions. Defendants are fully familiar with the rulings of the United States Supreme Court on June 21, 1973, which rulings implicitly acknowledge that the said federal obscenity

statutes were unconstitutionally vague and broad as of June 21, 1973.

XV

The true intent of the defendants is to prosecute under color of the federal obscenity statutes in order to harass plaintiffs and exhaust their financial and physical resources to such an extent as to put said plaintiffs out of business; to harass and interfere with their right to produce, distribute and exhibit constitutionally protected motion picture films, and to deny to the public at large access to motion picture films dealing with sex; to establish a national censorship of all motion picture films dealing with sex; to impose prior restraints upon the circulation of the press and abridge freedoms of speech and press secured to plaintiffs by the provisions of the First Amendment to the United States Constitution; to subject plaintiffs to arbitrary deprivation of liberty and property without due process of law, in violation of the provisions of the Fifth and Sixth Amendments to the United States Constitution; to subject plaintiffs to cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution; to subject plaintiffs to *ex post facto* laws; and to deprive plaintiffs of their right to produce, distribute and exhibit constitutionally protected motion picture films in interstate commerce, free from arbitrary and oppressive burdens, as guaranteed to plaintiffs by the provisions of Article I, Section 9, Clause 3 of the United States Constitution.

XVI

The aforesaid conduct on the part of the defendants violates the constitutional rights of plaintiffs under the First, Fifth, Sixth and Eighth Amendments to the

United States Constitution and Article I, Section 9, Clause 3 of the Constitution of the United States, in that defendants' conduct constitutes a prior restraint on the circulation of motion picture films and an abridgement and a denial of freedoms of speech and press; a deprivation of plaintiffs' liberty and property without due process of law; and subjects plaintiffs to cruel and unusual punishment and to *ex post facto* laws, as hereinabove stated. Defendants' conduct is contrary to law and without statutory authority, in violation of the stated provisions of the Constitution of the United States. By reason of the aforesaid unlawful and unconstitutional conduct of the defendants, plaintiffs will suffer substantial and irreparable loss and damage, and defendants' conduct and threatened conduct substantially inhibit the exercise of plaintiffs' constitutionally protected freedoms and the constitutional freedoms of other adults who choose to view motion picture films produced, distributed or exhibited by plaintiffs.

AS AND FOR A SECOND CAUSE OF ACTION, PLAINTIFFS ALLEGE:

XVII

Plaintiffs reallege and reincorporate herein as though fully set forth Paragraphs I through XVI of the First Cause of Action.

XVIII

Prior to June 21, 1973, in both federal and state obscenity cases, the standards of obscenity pursuant to which "prurient interest" and "patent offensiveness" were measured were national standards.

XIX

On June 21, 1973, the Supreme Court held that in a *state* obscenity prosecution, a state-wide standard was

sufficient to meet constitutional requirements. The Court was silent, however, as to whether a national standard was still required in federal obscenity cases.

XX

In *Manual Enterprises, Inc. v. Day*, 370 U.S.478, Mr. Justice Harlan, speaking for the Court, stated that in federal obscenity cases, a national standard was required, both because Congress had so mandated and also because the Constitution probably required a national standard in implementing a national law.

XXI

The defendants herein, however, have interpreted the quintet of decisions of the Supreme Court on June 21, 1973, as eliminating the national standard, even in federal obscenity cases.

A. On or about July 9, 1973, in *United States v. Lang, et al.*, United States District Court for the Central District of California, No. 10712-HP-CD, the defendants herein filed a Memorandum of Points and Authorities "In Support of Court Re-Transferring Case to District of Indictment", stating: "It is Government's position that under *Miller v. California* [93 S.Ct. 2607], local community standards are to be applied in resolving the issues in this case. Those local community standards are the standards of the district where the case was indicted [*sic*] and where the material involved in this case was to be distributed."

B. On or about September 6, 1973, the defendants herein filed an Appellee's Brief in the case of *United States v. Henson, etc., et al.*, in the United States Court of Appeals for the Ninth Circuit, No. 73-2063, in which the defendants herein stated:

"Since the Supreme Court only held that the application of local community standards does not violate the First Amendment, this case does not present the question as to what demographic area constitutes the 'community' for purposes of federal obscenity prosecutions. While a 'national' standard is not necessarily ruled out, it is conceivable that the federal judicial district in which prosecution is brought could be deemed the 'community' whose standards should apply." (Appellee's Brief, p. 17, n.6)

C. On or about September 18, 1973, the defendants herein filed Appellee's Supplemental Brief in the case of *United States v. London Press, Inc., et al.*, in the United States Court of Appeals for the Ninth Circuit, Nos. 72-2938 through 72-2942, inclusive, in which the defendants herein argued that the proper referent for applying contemporary community standards is the State or District. After asserting that it must be determined whether in *Miller v. California* the Supreme Court was impliedly stating that in federal, as well as state, prosecutions a state or district community standard is to be applied in determining whether the average person would find that the material in question appeals to the prurient interest and is patently offensive, defendants herein stated:

". . . Based on the Court's reference in *Miller* to both *Kois*, a state prosecution, and Roth, a Federal prosecution, when talking about contemporary community standards, it is reasonable to conclude that a state or district contemporary community standard should be applied in Federal obscenity prosecutions . . . It is obvious that it is

much more difficult to try and define the norm for an entire nation than it is for a particular state. The larger the area that is surveyed, the less chance the results will be accurate." (Appellee's Supplemental Brief, pp. 25-26)

XXII

The defendants herein seek to arrogate unto themselves the legislative power invested by the Constitution in Congress. It is Congress alone that has the power, under Article I, §8, Clause 3, to carry into execution the enumerated powers contain therein. The defendants herein, part of the Executive Branch of the Government, are totally without legislative power. It is for Congress, and Congress alone, to determine the nature and scope of the federal obscenity statutes.

XXIII

In light of the quintet of decisions of June 21, 1973, and the resultant utter confusion as to what standards —national, state, judicial district, or something else —must be utilized in identifying obscenity, the federal obscenity statutes involved herein do not supply fair notice or concrete guidelines to separate lawful from unlawful conduct. Persons of ordinary intelligence do not have a reasonable opportunity to know what is prohibited so that they may act accordingly. The said federal obscenity statutes are so vague, ambiguous, uncertain and overbroad that they are simply a trap for the innocent by not providing fair warning of what the law proscribes. Because of their vagueness, ambiguity and uncertainty, the said statutes lend themselves to arbitrary and discriminatory enforcement. There is simply no standard for the defendants herein, or any other

person, to govern prosecutions under said laws. As construed by the defendants herein, the statutes permit them, as well as judges and juries, to decide on an *ad hoc* and subjective basis what is or is not obscene under the federal statutes. As construed by the defendants, the federal statutes violate the fundamental principle in criminal law, as well as constitutional law, that there can be no crime without a law. The federal obscenity statutes, as construed by the defendants, purport to make it a crime to distribute sexual material, which material is to be measured by unknown and unknowable standards. As a result, grand juries, as well as trial juries and judges, are free to decide what sexual material should be suppressed and who should be punished as a felon under their own "moral" convictions as to what "the community" deems desirable or not.

XXIV

Subsequent to June 21, 1973, plaintiff Miranda and other members of the class herein have been subpoenaed to appear before federal grand juries investigating the alleged violation of the federal obscenity statutes, and other plaintiffs, including members of AFAA, have been threatened with prosecution under the said federal obscenity statutes for producing, distributing or exhibiting motion picture films after June 21, 1973, which defendants herein claim are violative of the said federal obscenity statutes. Unless restrained by the court herein, defendants will cause federal grand juries to return indictments against said plaintiffs and will prosecute said plaintiffs under the said federal obscenity statutes for producing, distributing or exhibiting motion picture films after June 21, 1973. Plaintiffs cannot obtain adequate vindication of their constitutional rights in any

single prosecution initiated by defendants against plaintiffs under the said federal obscenity statutes for conduct engaged in subsequent to June 21, 1973. The constitutional validity of the said statutes, subsequent to June 21, 1973, cannot be finally determined in a single prosecution, since defendants have the capacity to institute multiple prosecutions throughout the Nation, and have threatened to do so. Such conduct by defendants will necessarily involve plaintiffs in a multiplicity of criminal proceedings; threaten plaintiffs with the destruction of their good will and property; and exhaust their financial and physical resources, and thus make it impossible for plaintiffs to adequately defend against the said multiple criminal prosecutions. Such conduct will cause plaintiffs to suffer great, immediate and irreparable loss and damage, for which they have no adequate remedy at law.

XXV

Defendants' threats to enforce the said federal obscenity statutes, as herein stated, are not made with any expectation of securing valid convictions. Defendants are fully familiar with the fact that at present, national standards must be utilized to determine obscenity under the federal obscenity statutes. Defendants are also fully aware of the fact that the United States Supreme Court concluded, on June 21, 1973, that to judge alleged obscenity by national standards is "unrealistic" and "an exercise in futility", and that the Supreme Court has stated that national standards are not only "hypothetical" and "abstract", but also "unascertainable" and "unprovable." Defendants are also aware of the fact that the Supreme Court has held that when Congress passed the said obscenity statutes it intended ob-

scenity to be measured by national standards. Finally, defendants are fully aware of the fact that if the "national" standard rule in federal obscenity cases is to be changed, it must be changed by Congress, and not by defendants.

XXVI

The true intent of the defendants is to prosecute under color of the federal obscenity statutes, in order to harass plaintiffs and exhaust their financial and physical resources to such an extent as to put said plaintiffs out of business; to harass and interfere with their right to produce, distribute and exhibit constitutionally protected motion picture films, and to deny to the public at large access to motion picture films dealing with sex; to establish a national censorship of all motion picture films dealing with sex; to impose prior restraints upon the circulation of the press and abridge freedoms of speech and press secured to plaintiffs by the provisions of the First Amendment to the United States Constitution; to subject plaintiffs to arbitrary deprivation of liberty and property without due process of law, in violation of the provisions of the Fifth and Sixth Amendments to the United States Constitution; to subject plaintiffs to cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution; and to deprive plaintiffs of their right to produce, distribute and exhibit constitutionally protected motion picture films in interstate commerce, free from arbitrary and oppressive burdens, as guaranteed to plaintiffs by the provisions of Article I, §8, Clause 3 of the United States Constitution.

XXVII

The aforesaid conduct on the part of the defendants violates the constitutional rights of plaintiffs under the

First, Fifth, Sixth and Eighth Amendments to the United States Constitution, in that defendants' conduct constitutes a prior restraint on the circulation of motion picture films, and an abridgement and a denial of freedoms of speech and press; a deprivation of plaintiffs' liberty and property without due process of law; and subjects plaintiffs to cruel and unusual punishment. Defendants' conduct is contrary to law and without statutory authority, in violation of the stated provisions of the Constitution of the United States. By reason of the aforesaid unlawful and unconstitutional conduct of the defendants, plaintiffs will suffer substantial and irreparable loss and damage, and defendants' conduct and threatened conduct substantially inhibit the exercise of plaintiffs' constitutionally protected freedoms and the constitutional freedoms of willing adults who choose to view motion picture films produced, distributed or exhibited by plaintiffs.

XXVIII

To subject plaintiffs to criminal prosecutions for producing, distributing or exhibiting motion picture films under the federal obscenity statutes, when no one knows that standards must be applied under the federal statutes prior to the time there has been a judicial determination of a particular film's "obscenity" in a particular "community", constitutes a denial of due process of law, in violation of the Fifth Amendment.

A. On June 21, 1973, the Supreme Court stated that a procedure pursuant to which a challenged work's obscenity is judicially determined in a civil proceeding provides a person "the best possible notice, prior to any criminal prosecution, as to whether the materials are unprotected by the First Amendment and subject to state regulation".

B. By reason of the fact that there is total confusion as to what standard—national, state, judicial district, or other—is controlling under the federal obscenity statutes, such a prior determination is constitutionally required to satisfy the "fair notice" requirement of the Due Process Clause.

AS AND FOR A THIRD CAUSE OF ACTION, PLAINTIFFS ALLEGE:

XXIX

Plaintiffs reallege and reincorporate Paragraphs I through XXVIII as if fully set forth herein.

XXX

There is a bona fide dispute between the parties as to the constitutionality and applicability of the federal obscenity statutes to conduct engaged in by plaintiffs prior to June 21, 1973.

A. Plaintiffs allege that as of June 21st, the said federal obscenity statutes were unconstitutional for the reasons set forth in Paragraphs XI and XII herein.

B. Defendants allege that as of June 21st, the said federal obscenity statutes were in all respects constitutional, and that the new standards enunciated by the Supreme Court subsequent to June 21st may be utilized in determining whether conduct engaged in prior to June 21st was criminal conduct.

XXXI

There is also a bona fide dispute between the parties as to the constitutionality and applicability of the federal obscenity statutes to conduct engaged in by plaintiffs subsequent to June 21, 1973.

A. Plaintiffs allege that subsequent to June 21st, the said federal obscenity statutes are unconstitutional for the reasons set forth in Paragraphs XX-XXIII herein.

B. Defendants allege that subsequent to June 21st, the said federal obscenity statutes are in all respects constitutional.

XXXII

There is also a bona fide dispute between the parties as to the constitutionality and applicability of the federal obscenity statutes to conduct engaged in by plaintiffs subsequent to June 21, 1973.

A. Plaintiffs allege that because of the total confusion as to what standard—national, state, judicial district, or other—is to be utilized in determining obscenity under the federal obscenity statutes, that prior to any criminal prosecution being initiated under said statutes, defendants must first initiate a civil proceeding to determine whether a film thought to be obscene by defendants is obscene.

B. Defendants allege that no such prior civil proceeding is required before they may initiate criminal prosecutions under the said federal obscenity statutes.

WHEREFORE, plaintiffs pray:

1. For a temporary restraining order and preliminary and permanent injunction, restraining defendants, their agents, servants, employees, attorneys and representatives, from prosecuting plaintiffs (including members of the class) under Title 18 United States Code §§1461, 1462 and 1465 for conduct engaged in by plaintiffs (including members of the class) prior to June 21, 1973.

2. For a temporary restraining order and preliminary and permanent injunction, restraining defendants,

their agents, servants, employees, attorneys and representatives, from prosecuting or threatening to prosecute plaintiffs (including members of the class) under Title 18 United States Code §§1461, 1462 and 1465 for conduct engaged in by plaintiffs (including members of the class) subsequent to June 21, 1973.

3. For a temporary restraining order and preliminary and permanent injunction, enjoining defendants, their agents, servants, employees, attorneys and representatives, from initiating a criminal prosecution under Title 18 United States Code §§1461, 1462 and 1465, without first bringing a civil proceeding to determine whether a challenged film is obscene under any of the said statutes.

4. For a declaration that Title 18 United States Code §§1461, 1462 and 1465 were unconstitutional prior to June 21, 1973.

5. For a declaration that Title 18 United States Code §§1461, 1462 and 1465 are presently unconstitutional.

6. For a declaration that defendants may not initiate any criminal prosecutions under Title 18 United States Code §§1461, 1462 and 1465, without first bringing a civil proceeding to determine whether a challenged film is obscene under any of the said statutes.

7. For the convening of a three-judge court, pursuant to Title 28 United States Code §§2282 and 2284.

8. For such other and further relief as to the Court seems just.

FLEISHMAN, McDANIEL, BROWN & WESTON

By /s/ Stanley Fleishman

STANLEY FLEISHMAN

Attorneys for Plaintiffs

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1241

ADULT FILM ASSOCIATION OF AMERICA, ET AL., PETITIONERS

v.

HONORABLE MALCOLM M. LUCAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

On October 10, 1973, petitioners filed a Complaint for Declaratory Relief and Injunction (Pet. App. C) in the United States District Court for the Central District of California, alleging that in light of this Court's decision in *Miller* v. *California*, 413 U.S. 15, and related cases, the federal obscenity statutes[1] were unconstitutionally vague prior to June 21, 1973.[2] Petitioners sought a three-judge court pursuant to 28 U.S.C. 2282 and 2284 to

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[1]18 U.S.C. 1461, 1462 and 1465.

[2]On that date this Court handed down its decisions in *Miller* v. *California*, 413 U.S. 15; *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49; *United States* v. *Orito*, 413 U.S. 139; *Kaplan* v. *California*, 413 U.S. 115; *United States* v. *12 200-Ft. Reels of Super 8 mm Film*, 413 U.S. 123.

determine their request for an injunction against the enforcement of these statutes by prosecutions for acts committed before June 21, 1973. The district court refused to convene a three-judge court (Pet. App. B) and petitioners applied to the court of appeals for a writ of mandamus, which was summarily denied (Pet. App. A).

Petitioners contend that the federal obscenity statutes are unconstitutionally vague as applied to conduct which occurred prior to June 21, 1973. They argue that *Miller* held the pre-*Miller* test to be unconstitutional[3], and that it would be constitutionally improper to apply the *Miller* standards to activities which occurred before those standards were enunciated.[4] Thus, they conclude that the

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[3]Prior to this Court's decision in *Miller* v. *California, supra,* the test for obscenity was expressed by the Court's opinions in *Roth* v. *United States,* 354 U.S. 476 and *Memoirs* v. *Massachusetts,* 383 U.S. 413. This Court stated in *Memoirs, supra,* 383 U.S. at 418:

> * * * [T]hree elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

According to *Miller:*

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest * * * (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. [Citations omitted.]

413 U.S. at 24.

[4]Our brief in *Hamling* v. *United States,* No. 73-507, argued April 15, 1974, explains why we believe this argument is incorrect. We are sending a copy of that brief to petitioners.

federal obscenity statutes cannot constitutionally be applied to pre-*Miller* conduct.

However phrased, petitioners in substance are seeking a judicial determination of the effect of *Miller* on conduct engaged in prior to June 21, 1973. This issue is one which would properly be considered in the context of a defense to a criminal prosecution for pre-*Miller* conduct. It does not pose a constitutional issue appropriate for determination by a three-judge court.[5]

In any event, the question of the effect of *Miller* on pre-*Miller* conduct is presently before this Court in the context of a defense to a criminal prosecution, in *Hamling* v. *United States,* No. 73-507, argued April 15, 1974. The decision in *Hamling* will resolve the question the petitioners seek to compel a three-judge district court to consider. There is thus no need for the convocation of such a court at this time.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

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[5]The question of the effect of *Miller* on pre-*Miller* conduct may turn on the particular type of conduct involved. See our brief in *Hamling, supra,* at pp. 22-23. But since petitioners sought an injunction against the application of the obscenity statutes to *any* pre-*Miller* activity, the court had before it no specific conduct which was alleged to violate the statutes. Because of this "lack of a specific factual setting" the district court found the consitutional issue insubstantial (Pet. App. B).

SUBJECT INDEX

Page

Petitioners' Reply to Memorandum for the United States in Opposition to Petition for a Writ of Certiorari 1

TABLE OF AUTHORITIES CITED

Cases

Hamling, et al. v. United States, No. 73-507 .....2, 3

Reed Enterprises, Inc. v. Corcoran, 354 F.2d 519 (D.C. Cir. 1965) 3

Statutes

United States Code, Title 18, Sec. 1461 .....1, 2

United States Code, Title 18, Sec. 1462 .....1, 2

United States Code, Title 18, Sec. 1465 .....1, 2

United States Code, Title 28, Sec. 2282 4

United States Code, Title 28, Sec. 2284 4

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1241

ADULT FILM ASSOCIATION OF AMERICA, a Texas corporation; ENTERTAINMENT VENTURES, INC., a California corporation; DAVID FRIEDMAN and VINCENT MIRANDA, on Behalf of Themselves and All Other Persons Similarly Situated,

Petitioners,

vs.

THE HONORABLE MALCOLM M. LUCAS, District Judge of the United States District Court for the Central District of California,

Respondent,

WILLIAM B. SAXBE, individually and as Attorney General of the United States; and WILLIAM D. KELLER, individually and as United States Attorney for the Central District of California,

Real Parties in Interest.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners' Reply to Memorandum for the United States in Opposition to Petition for a Writ of Certiorari.

1. The Government does not deny that petitioners have raised a substantial question as to the constitutionality of the federal obscenity statutes, Title 18 United States Code §§ 1461, 1462 and 1465, nor does the Government deny that petitioners have standing to raise the constitutional question. Nevertheless, the Gov-

ernment opposes the grant of a writ of certiorari, contending that:

(a) *Hamling, et al. v. United States,* No. 73-507, "will resolve the question the petitioners seek to compel a three-judge court to consider"; and

(b) the question of the constitutionality of the federal obscenity statutes "does not pose a constitutional issue appropriate for determination by a three-judge court" because the issue "is one which would properly be considered in the context of a defense of a criminal prosecution. . . ."

2. *Hamling, et al. v. United States,* No. 73-507, will *not* resolve *all* the questions the petitioners seek to compel a three-judge court to consider.

It is true that petitioners herein do contend that the federal obscenity statutes are unconstitutionally vague as applied to pre-*Miller* conduct. Petitioners also contend however that the statutes are unconstitutionally vague as applied to post-*Miller* conduct. In their Complaint, petitioners sought an injunction restraining the Attorney General of the United States and the United States Attorney for the Central District of California "from prosecuting or threatening to prosecute [petitioners] (including members of the class) under Title 18 United States Code §§ 1461, 1462 and 1465 for conduct engaged in by [petitioners] (including members of the class) subsequent to June 21, 1973." [APPENDIX C to Pet. for Writ of Cert., pp. 23-24]. Petitioners also sought a declaration that the Attorney General of the United States and the United States Attorney for the Central District of California may not initiate any criminal prosecutions under said statutes without first bringing a civil proceeding to determine whether a chal-

lenged film is obscene under any of said statutes. [APPENDIX C to Pet. for Writ of Cert., p. 24].

It is thus apparent that petitioners herein have raised substantial constitutional questions which are not encompassed in the questions before the Court in *Hamling, et al. v. United States,* No. 73-507.

3. The Government is in error in arguing that the question of the unconstitutionality of the federal obscenity statutes can be raised *only* as a defense to a criminal prosecution. The answer to the Government's contention is found in *Reed Enterprises, Inc. v. Corcoran,* 354 F.2d 519 (D.C. Cir. 1965), where the allegations concerning the appropriateness of equitable relief were similar to the allegations in the Complaint herein. In *Reed,* the Court said:

> "The Government's suggestion that petitioners have an adequate remedy at law in the criminal proceedings now pending against them, while perhaps appropriate in cases outside the First Amendment area where a single prosecution is contemplated, is unavailing here. The Government has not even denied that it contemplates multiple prosecutions. . . . Moreover, under some circumstances even a single 'criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. * * * The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases.' * * * Where the plaintiff complains of chills and threats in the protected First Amendment area, a court is more disposed to find that he is presenting a real and not an abstract controversy." (354 F.2d at 523).

For the foregoing reasons, a writ of certiorari should issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit. That court should be ordered to direct the respondent court to take the necessary steps for the convening of a three-judge court in accordance with the provisions of Title 28 United States Code §§ 2282 and 2284.

Respectfully submitted,

STANLEY FLEISHMAN,
Attorney for Petitioners.

SAM ROSENWEIN,
FLEISHMAN, MCDANIEL, BROWN &
WESTON,
Of Counsel.